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In the Supreme Court of the United States

OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE
IOWA STATE PENITENTIARY, PETITIONER

v.

ROBERT ANTHONY WILLIAMS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The United States will address the following question:

Whether, at respondent's retrial on a charge of first-degree murder, evidence pertaining to the discovery and condition of the victim's body was properly admitted under the inevitable discovery exception to the exclusionary rule.

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INTEREST OF THE UNITED STATES

This case presents an important issue relating to the scope of the exclusionary rule that has not previously been settled by this Court. Every federal court of appeals, however, has explicitly endorsed the "inevitable discovery" exception to the exclusionary rule (see pages 10-11, *infra*). Accordingly, the Court's decision in this case is as likely to affect federal prosecutions as state prosecutions. Because the proper application of the exclusionary rule is central to the fair and efficient administration of criminal justice, the United States has a substantial interest in the outcome of this case.

STATEMENT

In *Brewer v. Williams*, 430 U.S. 387 (1977), this Court affirmed the grant of federal habeas corpus relief setting aside respondent's state conviction for first-degree murder after concluding that statements leading the police to the victim's body had been obtained from respond-

ent in violation of his right to assistance of counsel. In an oft-cited footnote, however, the Court observed that, on retrial, evidence of where the body was found and its condition "might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from [respondent]" (430 U.S. at 407 n.12).

1. On retrial, evidence of the body and its condition was admitted on the theory suggested by this Court, and respondent was again convicted of first-degree murder. The Iowa trial court held a suppression hearing at which it determined that the State had proven, by a preponderance of the evidence, that the body would have been discovered in any event. The Supreme Court of Iowa affirmed the conviction (Pet. App. A28-A67). In a comprehensive opinion, that court held that it would adopt the "inevitable discovery" doctrine as an exception to the exclusionary rule. The court concluded that the doctrine should consist of a two-part test (Pet. App. A40-A41):

First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery would have occurred. Courts must use extreme caution to avoid applying the rule on the basis of hunch or speculation.

The Iowa trial court had not included the absence of police bad faith as an element in its invocation of the inevitable discovery doctrine. Nevertheless, the state supreme court was able to find for itself that the State had satisfied that prong of the test because, in its view, the relevant inquiry was objective in nature. The court explained its ruling for the State on the bad faith issue as follows (Pet. App. A45):

While there can be no doubt that the method upon which the police embarked in order to gain Williams's assistance was both subtly coercive and purposeful,

and that its purpose was to discover the victim's body, * * * we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case, as noted earlier in this opinion, has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.

The state supreme court then turned to the factual question: whether the State had shown by a preponderance of the evidence that the victim's body would have been found by lawful means.¹ The court reviewed in considerable detail (Pet. App. A46-A49) the evidence relating to the ongoing search for the body and how that search would have progressed in the absence of respondent's statements leading the police to the body. It summarized its finding as follows (*id.* at A49) :

Our review of the evidence leads to the conclusion that persons conducting a search such as the one which was conducted in Poweshiek and Jasper Counties and which was to be continued into Polk County would have found the body of Pamela Powers. Her body was frozen to the side of a cement culvert. It would have been nearly impossible for anyone who came down into the ditch to look into the culvert, as the searchers were doing, to fail to see the child's body. We thus conclude that as a result of the search that was underway, and which would have been continued, the body of Pamela Powers would have been found even in the absence of assistance by defendant. Further, that body would have been found in essentially the same condition it was in at

¹ Iowa law provides for de novo appellate review of factual as well as legal determinations in cases raising constitutional challenges. See *Armento v. Baughman*, 290 N.W.2d 11, 15 (Iowa 1980); *State v. Ege*, 274 N.W.2d 350, 352 (Iowa 1979); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977).

the time of the actual discovery, so that all of the evidence which it actually yielded would have been available to the police.

After rejecting other issues raised by respondent, the state supreme court affirmed the conviction, and this Court denied respondent's petition for a writ of certiorari (446 U.S. 921 (1980)).

2. Thereafter, respondent sought habeas corpus relief under 28 U.S.C. 2254 in the United States District Court for the Southern District of Iowa. Respondent advanced three specific challenges to the state courts' rulings on the inevitable discovery doctrine: (1) that the inevitable discovery doctrine is constitutionally deficient; (2) that the burden of proof applied by the state courts was constitutionally inadequate; and (3) that the finding that the body would have been discovered in any event was not supported by the record (Pet. App. A75).

The district court rejected all of respondent's challenges. Although it never specifically addressed the presence or absence of police bad faith in this case, the court approved the state supreme court's two-part formulation of the inevitable discovery doctrine (Pet. App. A77). The district court also agreed with the application of a preponderance of the evidence burden of proof, rejecting respondent's claim that the State should have been required to prove inevitable discovery by clear and convincing evidence (*id.* at A77-A78). Finally, the court held that it was required to presume the correctness of the state courts' factual findings unless one of the exceptions to 28 U.S.C. 2254(d) was applicable (Pet. App. A78). Respondent contended that he had newly discovered evidence showing that material facts were not adequately developed at the state court suppression hearing and that that hearing was not full, fair and adequate (see 28 U.S.C. 2254(d)(2) and (6)). The district court doubted that respondent had exhausted his state remedies with respect to the newly discovered evidence and also doubted that the new evidence was of sufficient import to bring respondent within one of Section 2254(d)'s ex-

ceptions (Pet. App. A79-A80), but it nevertheless conducted its own independent review of the evidence. Based on that review, the district court concluded, as had the state courts, that the body would have been found by the searchers in essentially the same condition it was in at the time of the actual discovery (*id.* at A80). The court explained (*ibid.*):

The body was right next to the end of a culvert located beneath a road. Much of the body was covered with snow, but her face and part of her brightly colored striped shirt were not touched by snow and were completely exposed to the view of any person looking at the end of the culvert. The searchers were going into the ditches to look into all culverts, and they would have searched along the road where the culvert and body were located.

After rejecting respondent's other collateral attacks on the conviction, the district court denied his petition for a writ of habeas corpus (Pet. App. A88).

3. The court of appeals reversed (Pet. App. A1-A18). For purposes of its decision, the court assumed without deciding that there is an inevitable discovery exception to the exclusionary rule and that the state supreme court had correctly articulated its requirements (*id.* at A9). The court then held that the State had failed to show that the police did not act in bad faith (*id.* at A9-A17).²

The court first held that the state supreme court's finding that the police did not act in bad faith was not entitled to the presumption of correctness mandated by 28 U.S.C. 2254(d). It observed (Pet. App. A11) that the "Iowa court's discussion of bad faith is not really a finding of fact at all. It is more like a legal conclusion that police conduct later found constitutionally blameless

² Because its decision rested on the State's alleged failure to prove the absence of bad faith, the court of appeals did not review the factual evidence relating to inevitable discovery, nor did it determine whether the burden of proof should be clear and convincing evidence or a preponderance of the evidence (Pet. App. A9-A10).

by a large minority of this Court and the Supreme Court cannot amount to bad faith." Alternatively, the court held that, if the state supreme court's opinion was to be treated as a finding of fact that Detective Leaming honestly believed his conversation with respondent (see *Brewer v. Williams*, 430 U.S. at 392-393) did not violate the Sixth Amendment, then it was "utterly without record support" and thus exempt from Section 2254(d)'s presumption of correctness (see 28 U.S.C. 2254(d)(8)).

The court of appeals went on to reject the notion that bad faith was to be measured objectively. It held (Pet. App. A12) that the "question before us is not whether the Supreme Court's opinion in *Brewer v. Williams* is fairly debatable as a legal matter. Obviously it is. The question is rather what was in Detective Leaming's mind during that car ride back to Des Moines. * * * The relevant question—bad faith—is subjective."

In concluding that the record failed to support the absence of police bad faith, the court noted (Pet. App. A13-A14) that in *Brewer* this Court referred to the Sixth Amendment violation as "clear"; described the police conduct as having been undertaken "deliberately," "designedly," and "purposely"; and found the situation before it to be "constitutionally indistinguishable from" the situation in *Massiah v. United States*, 377 U.S. 201 (1964). The court also cited similar comments from the concurring opinions of Justices Marshall and Powell (Pet. App. A14). In addition, the court stated (*id.* at A15) that in conversing with respondent Detective Leaming had broken an express promise to respondent's attorney and that he had done so "not merely to find [the body], but also to obtain statements from [respondent] that might be used against him."³ The court con-

³ The State disputes the court's assertion that Detective Leaming broke any agreement with respondent's counsel (see Pet. Reply Br. 8-9). Moreover, in an article comprehensively reviewing the record of the first trial in this case, Professor Kamisar has concluded that the evidence does not support the existence of an agreement between Detective Leaming and respondent's counsel. See

cluded (*id.* at A16) that “[a] design to obtain incriminating evidence by mental coercion is a design to violate the Constitution.”

4. Rehearing en banc was denied by an equally divided court (Pet. App. A19). The dissenting judges would have granted rehearing en banc because of the importance of the case (*id.* at A20) and because it appeared doubtful that the issue of the officer’s good or bad faith had “*ever* been the subject of an evidentiary hearing” (*id.* at A21).

The panel also denied rehearing, but it wrote a supplemental opinion (Pet. App. A23-A27) responding to some of the contentions raised by the State in its petition for rehearing. First, the panel rejected the State’s contention that bad faith should not be a component of the inevitable discovery doctrine. The panel concluded that the State’s counsel had conceded that point at oral argument and held that, in any event, the absence of bad faith was a necessary component of the exception in order to preserve the deterrent effects of the exclusionary rule (*id.* at A24-A25). Second, the panel rejected the State’s suggestion that the standard for bad faith should be objective and not subjective. Again, the panel relied on concessions it deemed to have been made at oral argument and on the need for deterrence of police misconduct (*id.* at A25). Finally, the panel rejected the argument that the State had been unfairly taken by surprise and had never had the opportunity to prove good faith (*id.* at A25-A27).⁴

Kamisar, *Foreword: Brewer v. Williams—A Hard Look At A Discomfiting Record*, 66 Geo. L.J. 209, 212-213 & nn.23-24 (1977).

⁴ Not having participated in the oral argument before the court of appeals, we are in no position to evaluate the panel’s assertion that the State conceded various issues at that argument. But we do not read the panel’s opinion on rehearing as resting on the alleged concessions, since the panel independently ruled on the merits. Moreover, intelligent resolution of the questions before this Court necessarily requires that these issues be addressed, and we do so in this brief.

SUMMARY OF ARGUMENT

A. The "inevitable discovery" exception to the exclusionary rule finds its doctrinal underpinnings in this Court's explicit approval of the related "independent source" and "attenuation" doctrines. Thus, following this Court's lead in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and *Wong Sun v. United States*, 371 U.S. 471 (1963), every federal court of appeals having jurisdiction over criminal cases has explicitly endorsed the inevitable discovery rule, as have the vast majority of state courts. All three doctrines rest on the premise that the severe sanction of the exclusionary rule should not be imposed in the absence of a sufficiently close causal connection between police misconduct and the discovery of the challenged evidence. When evidence would have been discovered regardless of any government misconduct, the misconduct is not a necessary or "but-for" cause of the discovery, and suppression under such circumstances results in an unnecessary windfall to the defendant at the expense of society's interest in convicting the guilty. An analogy may also be drawn to the "harmless error" rule, whereby not even constitutional errors require automatic reversal of a conviction. *Chapman v. California*, 386 U.S. 18, 21-22 (1967). Instead, the focus is on whether the error was likely to have changed the result of the trial (*id.* at 22).

B. Despite criticism to the contrary, the inevitable discovery doctrine does not require courts to engage in unwarranted speculation. So long as the government is held to a sufficiently strict substantive standard of proof, courts are fully capable of preventing abuse of the doctrine. In our view, the state supreme court correctly held that the prosecution must show that the challenged evidence *would* have been discovered in any event, and not merely that it "might have" or "could have" been discovered. That showing should be made by a preponderance of the evidence—the burden of proof generally applicable at all suppression hearings. See, *e.g.*, *United*

States v. Matlock, 415 U.S. 164, 178 n.14 (1974). A review of the State's evidence in this case clearly demonstrates that it satisfied this standard.

C. The absence of bad faith is neither a logical nor an appropriate component of the inevitable discovery doctrine. The premise of that doctrine is the lack of a necessary causal connection between the police misconduct and the discovery of the evidence, and the *mens rea* of the offending officer is irrelevant to the question of the presence or absence of that causal connection. The important point is to ensure that the police do not profit by their misconduct; that objective is fully realized by the strict standard of proof that we propose.

In any event, we doubt the validity of the court of appeals' assumption that, absent a good-faith component, the inevitable discovery doctrine would significantly weaken the deterrent effects of the exclusionary rule. Among other reasons, it seems quite improbable that a police officer would engage in conduct that he knew or reasonably believed to be illegal, thereby subjecting himself to possible civil liability and disciplinary action, when he anticipates that the evidence he seeks can be obtained through lawful means. And even if it were presumed that some slight amount of deterrence could be obtained by requiring proof of good faith, that incremental benefit would not overcome the societal costs imposed by the exclusionary rule in this type of case.

Finally, if good faith is deemed relevant at all, we submit that the inquiry should focus on the objective reasonableness of the police conduct, as measured against extant principles of law, rather than a particular officer's subjective state of mind. An objective inquiry will protect the judicial system against unduly burdensome and generally unproductive inquiries into the subjective state of mind of a particular officer, while at the same time ensuring that law enforcement officials are not encouraged to depart from established constitutional requirements.

ARGUMENT

ILLEGALLY OBTAINED EVIDENCE SHOULD NOT BE SUPPRESSED IF IT WOULD HAVE BEEN DISCOVERED BY LAWFUL MEANS NOT ENTAILING EXPLOITATION OF THE OFFICIAL MISCONDUCT

The "inevitable discovery" doctrine rests on the premise that the severe sanction of the exclusionary rule should not be invoked if the prosecution can establish that otherwise-tainted evidence would have been discovered in any event through lawful and predictable investigatory procedures. Although this Court has not expressly adopted the inevitable discovery doctrine, it has sown the seeds for the lower courts' widespread acceptance of that doctrine through explicit approval of analytically related exceptions to the "fruit of the poisonous tree" rule. Both the "independent source" exception first recognized in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and the "attenuation" exception established in *Wong Sun v. United States*, 371 U.S. 471 (1963), serve as the doctrinal foundation for the inevitable discovery rule. Relying on this background, every federal court of appeals having jurisdiction over criminal matters, including the Eighth Circuit in a case decided shortly after the instant case, has endorsed the inevitable discovery doctrine. See *Wayne v. United States*, 318 F.2d 205, 209 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963); *United States v. Bienvenue*, 632 F.2d 910, 914 (1st Cir. 1980); *United States v. Fisher*, 700 F.2d 780, 784 (2d Cir. 1983); *Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States v. Seohnlein*, 423 F.2d 1051, 1053 (4th Cir.), cert. denied, 399 U.S. 913 (1970); *United States v. Brookins*, 614 F.2d 1037, 1042, 1044 (5th Cir. 1980); *Papp v. Jago*, 656 F.2d 221, 222 (6th Cir. 1981); *United States ex rel. Owens v. Twomey*, 508 F.2d 858, 865-866 (7th Cir. 1974); *United States v. Apker*, 705 F.2d 293, 306-307 (8th Cir. 1983); *United States v. Schmidt*, 573 F.2d

1057, 1065-1066 n.9 (9th Cir.), cert. denied, 439 U.S. 881 (1978);⁵ *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982); *United States v. Roper*, 681 F.2d 1354, 1358 (11th Cir. 1982).⁶ As we show below, the inevitable discovery doctrine is an eminently sensible rule having a firm footing in established principles governing the proper application of the exclusionary rule.

A. The Inevitable Discovery Doctrine Is A Logical Complement To The Independent Source And Attenuation Doctrines

1. Despite the exclusionary rule's broad purpose of deterring unlawful police conduct, this Court has long recognized that the rule is inapplicable when there is no significant causal relationship between the police misconduct and the discovery of the challenged evidence. This principle was first enunciated by the Court more than 60 years ago in *Silverthorne Lumber Co.* In that case, the Court held that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to any evidence derived from or found through exploitation of the improper conduct. At the same time, however, the Court emphasized that such derivative evidence does not automatically "become sacred and inaccessible" (251 U.S. at 392). Rather, if the government's knowledge "is gained from an independent source [such facts] may be proved like any others * * *" (*ibid.*). See also *Costello*

⁵ Respondent cites *United States v. Hoffman*, 607 F.2d 280, 285 (9th Cir. 1979), for the proposition that "*Schmidt* did not indicate that [the Ninth Circuit] had adopted the [inevitable discovery] doctrine" (Br. in Opp. 13 n.4). But in several cases decided after *Hoffman*, the Ninth Circuit has relied on *Schmidt* and applied the doctrine. See, e.g., *United States v. Wiga*, 662 F.2d 1325, 1333 n.9 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982); *United States v. Huberts*, 637 F.2d 630, 638-639 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981); *United States v. Kandik*, 633 F.2d 1334, 1336 (9th Cir. 1980).

⁶ As the Supreme Court of Iowa noted, the state courts as well "appear to be nearly unanimous in their recognition and approval of the [inevitable discovery] rule" (Pet. App. A38 (citing cases)).

v. *United States*, 365 U.S. 265, 280 (1961); *Nardone v. United States*, 308 U.S. 338, 341 (1939).

In *Wong Sun*, the Court again recognized the general principle that illegally-obtained evidence need not always be suppressed. As the Court explained (371 U.S. at 487-488):

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Maguire, Evidence of Guilt*, 221 (1959).

Accordingly, most "fruit of the poisonous tree" cases "begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity." *United States v. Crews*, 445 U.S. 463, 471 (1980). But that premise is not necessarily controlling; under *Wong Sun*, the question remains "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews*, 445 U.S. at 471. See also *Dunaway v. New York*, 442 U.S. 200, 216-219 (1979); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Brown v. Illinois*, 422 U.S. 590 (1975); *United States v. Wade*, 388 U.S. 218, 241 (1967).

2. As the courts of appeals have recognized, the inevitable discovery doctrine rests on the same absence of a sufficiently close connection between the state's wrongdoing and the discovery of the challenged evidence as the independent source and attenuation doctrines. See, e.g., *United States v. Alvarez-Porras*, 643 F.2d 54, 59-60 (2d Cir.), cert. denied, 454 U.S. 839 (1981); *United States v. Brookins*, 614 F.2d at 1041-1042; *United States*

ex rel. Owens v. Twomey, 508 F.2d at 865. It is of course true that when evidence is discovered as a direct result of government misconduct, that misconduct may be said to be the *de facto* cause of the discovery even if the evidence would have been found in any event. But the government misconduct in such a situation is no more *necessary* to the discovery of the evidence than it would have been if the actual discovery of the evidence had derived from a source independent of the illegality. In this sense, the illegality is not the cause of the discovery at all, for "[c]onduct is not a *legal* cause of an event if the event would have occurred without it." *United States v. Cole*, 463 F.2d 163, 173 (2d Cir.), cert. denied, 409 U.S. 942 (1972) (emphasis added). Cf. W. Prosser, *Law of Torts* § 41, at 242 (1964 ed.) ("A failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there" and "[t]he omission of a traffic signal to an automobile driver who could not have seen it if it had been given is not a cause of the ensuing collision."). As one commentator has explained (*Maguire, How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., Criminology & Police Sci. 307, 313 (1964) (emphasis added)):

[T]he exclusionary rule does not come into play merely because the proffered evidence is in fact the product of an illegal act. If the prosecution can establish that the illegal act merely contributed to the discovery of the allegedly tainted information and that such information would have been acquired lawfully even if the illegal act had never transpired, the presumptive taint is removed, and the apparently poisoned fruit is made whole. In other words, if the government establishes that the illegal act was not an *indispensable* cause of the discovery of the proffered evidence, the exclusionary rule does not apply.

In short, the exclusionary rule should no more apply when the challenged evidence inevitably would have been discovered regardless of the illegality than when it was

discovered before the illegality⁷ or when it was discovered after the illegality based on an independent source—for in each of these situations the illegality is not a necessary cause of the discovery of the evidence.

The inevitable discovery doctrine also comports with the rationale underlying the harmless-constitutional-error rule. As the Court explained in *Chapman v. California*, 386 U.S. 18, 22 (1967), that rule “serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.” Here, too, the inevitable discovery doctrine serves to block setting aside convictions that would have been obtained without exploitation of the police error.

B. Properly Applied, The Inevitable Discovery Doctrine Is Neither Unduly Speculative Nor An Inducement To Unlawful Police Conduct

1. The inevitable discovery doctrine has been criticized as being too speculative. See, e.g., Comment, *Fruit of the Poisonous Tree: Recent Developments as Viewed Through Its Exceptions*, 31 U. Miami L. Rev. 615, 628 (1977). In fact, however, knowledge that the police would have discovered the evidence by lawful means may be virtually certain in some cases. See, e.g., *Government of the Virgin Islands v. Gereau*, 502 F.2d at 927-928. But we do not believe that a showing that the evidence would *certainly* have been discovered should be a prerequisite to application of the doctrine. If absolute certainty were a standard that prevailed throughout the law, the law would be altogether ineffectual; indeed, we convict people of crimes and send them to jail on a standard below that of absolute certainty. It is no doubt true that in almost any case in which the government invokes the inevitable discovery doctrine a scenario could be imagined in which the evidence would *not* inevitably have been

⁷ See *United States v. Crews*, 445 U.S. at 475 (Brennan, J.) (the exclusionary rule “does not reach backward to taint information that was in official hands prior to any illegality”).

found. But in *Nardone v. United States*, 308 U.S. at 341, this Court cautioned against the use of "[s]ophisticated argument" to establish a causal connection between the initial illegal conduct and the discovery of the challenged evidence, and that caution applies equally in the inevitable discovery context.

At the other extreme, we also do not suggest that the government may successfully invoke inevitable discovery if it can show only that the challenged evidence "might have" or "could have" been discovered without the illegality, as some courts have indicated. See, e.g., *United States v. O'Brien*, 174 F.2d 341, 346 (7th Cir. 1949); *Parts Mfg. Corp. v. Lynch*, 129 F.2d 841, 842 (2d Cir.), cert. denied, 317 U.S. 674 (1942). Rather, we believe that the government should be required to show a reasonable probability that the evidence *would* have been discovered. See, e.g., *United States v. Brookins*, 614 F.2d at 1048; *Wayne v. United States*, 318 F.2d at 209; LaCount & Girese, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 Alb. L. Rev. 483, 490 (1976); Maguire, 55 J. Crim. L., Criminology & Police Sci. at 315.

The nature of this showing naturally will vary depending on the circumstances of the individual case. In most cases, however, the showing will consist of proof that the police would have utilized (or, as in this case, that the police already had commenced utilization of) certain lawful and predictable investigatory procedures and that those procedures would have resulted in the discovery of the challenged evidence (see, e.g., *United States v. Brookins*, 614 F.2d at 1048-1049; *Government of the Virgin Islands v. Gereau*, 502 F.2d at 927-928; *United States v. Falley*, 489 F.2d 33, 40 (2d Cir. 1973); *United States v. Seohnlein*, 423 F.2d at 1053; *United States v. Carino*, 417 F.2d 117, 118 (2d Cir. 1969)), or that a person who is not a law enforcement official, such as a victim or a witness, would have voluntarily reported the evidence or information leading to the evidence to the police (see, e.g., *Wayne v. United States*, 318 F.2d at

209; *People v. Tucker*, 19 Mich. App. 320, 172 N.W.2d 712, 717-718 (1969), *aff'd*, 385 Mich. 594, 189 N.W.2d 290 (1971)).

In the instant case, the state supreme court expressly rejected a "might have" test (Pet. App. A44) and after careful consideration went on to find by a preponderance of the evidence that the police "would have" found the body of Pamela Powers in essentially the same condition it was in at the time of the actual discovery (Pet. App. A46-A49).^{*} The federal district court, after conducting its own independent review, reached the same conclusion (Pet. App. A78-A79). Because of its ruling on the question of bad faith (see page 5 note 2, *supra*), the court of appeals did not review these factual determinations

^{*} The state court's use of a preponderance of the evidence standard, upheld by the federal district court (Pet. App. A77-A78) and not addressed by the court of appeals, is consistent with this Court's observation that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974). See also *Lego v. Twomey*, 404 U.S. 477, 486-487 (1972). But see *United States v. Wade*, 388 U.S. at 240. In *United States v. Falley*, 489 F.2d at 41, the Second Circuit expressly adopted a preponderance of the evidence standard for purposes of applying the inevitable discovery doctrine, and two circuits have adopted that standard for the related independent source rule. See *United States v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974); *United States v. Schipani*, 289 F.Supp. 43, 63-64 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). But see *Government of the Virgin Islands v. Gereau*, 502 F.2d at 927 (adopting without discussion a "clear and convincing evidence" standard for inevitable discovery cases).

In our view, the state supreme court correctly resolved the issue. If, as we propose, the prosecution is held to a high standard of substantive proof (i.e., proof that the evidence *would* have been discovered), then it becomes unnecessary and excessive to require that showing to be made by clear and convincing evidence. Indeed, the combination of the two heightened standards could well make the doctrine unworkable. We believe that the danger of unwarranted speculation can be adequately controlled by requiring the prosecution to show, by a preponderance of the evidence, that the challenged evidence would have been discovered in any event.

(Pet. App. A9), and thus a remand may be required for that purpose. But it is instructive to review some of the evidence actually offered by the State in this case because it demonstrates that courts are fully capable of applying the inevitable discovery doctrine without resort to unwarranted speculation.

At the suppression hearing preceding respondent's retrial, the State offered the testimony of Thomas Ruxlow of the Iowa Bureau of Criminal Investigation, whose task it had been to organize and direct the search for Pamela Powers' body (5/31/77 Tr. 33). Ruxlow testified that on December 26, 1968, approximately 200 people responded to a public appeal for volunteers to search for the girl (*id.* at 34). Ruxlow then testified that he marked off highway maps of Poweshiek and Jasper Counties in grid fashion, divided the volunteers into teams of four to six persons, and assigned each team to search specific grid areas (*ibid.*). Ruxlow further testified that, had it been necessary, the search would have been extended into Polk County, utilizing the same grid system (*id.* at 39-40).

Ruxlow testified that the search method he employed was commonly used by police and that he himself was experienced in directing this type of search (5/31/77 Tr. 34). Ruxlow also explained that the searchers were instructed "to check all the roads, the ditches, any culverts; they were instructed to get down and look into any culverts. If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted" (*id.* at 35). During the course of the search, Ruxlow was advised that the searchers were in fact getting out of their vehicles and looking into ditches and culverts (*id.* at 48).

The search commenced at approximately 10 a.m. in Poweshiek County and moved westward through that county and through Jasper County to the county line separating Jasper County from Polk County (5/31/77 Tr. 36). At approximately 3 p.m., the search was sus-

pended, apparently because at that time respondent was about to direct Detective Leaming to evidence relating to the crime (*id.* at 51). Because respondent did in fact lead the police to the body, the search was never resumed (*id.* at 57). The body was found, however, in what would have been the first grid area to be searched in Polk County (*id.* at 39). Ruxlow testified that if the search had continued without interruption, that grid area would have been searched in approximately three to five hours (*id.* at 41).

Photographs of the body as it appeared upon discovery also were introduced into evidence. As the federal district court found (Pet. App. A80), the photographs showed that both the victim's face and an item of brightly colored clothing "were completely exposed to the view of any person looking at the end of the culvert."

In short, the State demonstrated that lawful and predictable systematic investigatory procedures had been underway for most of the day before respondent led the police to the body,⁹ that the location where the body was actually discovered was within the area to be searched, and that the searchers were only hours away from finding the body. In light of the nature of the crime, which produced an immediate response from 200 volunteers, it required no unwarranted speculation on the part of the courts that considered the issue to conclude that the search would have been carried to a successful conclusion.

2. Although the state supreme court viewed the test as objective while the court of appeals held that it should be subjective, both courts concluded that the absence of police bad faith is a necessary component of the inevitable discovery doctrine. Both courts thought that the absence of bad faith is required in order to preserve the deterrent effects of the exclusionary rule. As the court

⁹ In our view, this fact makes application of the inevitable discovery doctrine especially appropriate in this case. There can be no claim here that the facts relating to inevitable discovery constituted post hoc rationalization designed to overcome the police illegality; on the contrary, regular investigative procedures had in fact commenced well before the illegality occurred.

of appeals viewed the issue, "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the exclusionary rule reduced too far" were the rule otherwise (Pet. App. A10 n.5). In our view, however, the imposition of a good faith requirement, whether objective or subjective, misapprehends the theoretical basis underlying the inevitable discovery doctrine and rests on an exaggerated assessment of the doctrine's impact on the deterrent function of the exclusionary rule. Indeed, apart from the Eighth Circuit here, no federal court of appeals appears to regard good faith as a necessary component of the inevitable discovery doctrine.¹⁰ And even the Eighth Circuit, in its subsequent decision in *United States v. Apker, supra*, adopting the inevitable discovery doctrine, did not suggest the existence of a good faith requirement. Similarly, the Supreme Court of Iowa appears to be the only state court to hold that good faith plays any role in the inevitable discovery doctrine.

a. The inevitable discovery doctrine—like the independent source rule from which it derives—rests on the proposition that the substantial societal cost of excluding probative evidence because of police misconduct should not be incurred when there exists no necessary causal connection between the misconduct and the discovery of the challenged evidence. Once that proposition is accepted, it makes no sense to carve out an exception for bad faith police misconduct, because the *mens rea* of the offending officer is irrelevant to the question of the presence or absence of a causal connection. When there is no necessary causal connection between the illegality and the challenged evidence, the bad faith of the offending

¹⁰ In one case discussing the doctrine, the Second Circuit placed considerable weight on the officers' good faith, but the court also went to some pains to assert that it was not actually deciding the case on the basis of an inevitable discovery theory. *United States v. Alvarez-Porras*, 643 F.2d at 58-66. In a subsequent case, the Second Circuit applied the doctrine without any mention of good faith. *United States v. Fisher*, 700 F.2d at 784.

officer simply will not provide one. Indeed, we are aware of no case in which it has been suggested that application of the independent source rule depends upon the good faith of the offending officer.

If the initial illegality is to be treated as "purged" (see *Wong Sun v. United States*, 371 U.S. at 488), then it makes no sense to evaluate the seriousness of the "primary taint" even after it has been determined that it can be severed from the introduction of the challenged evidence. The key point, as stressed by one commentator, is that the government must not be allowed to benefit from the initial illegality (Maguire, 55 J. Crim. L., Criminology & Police Sci. at 313) :

[I]t is essential to the application of the federal exclusionary rule to keep constantly in mind that the benefit which it gives to a specific defendant is an unavoidable, and regrettable, consequence of the rule and not its purpose. This purpose frequently is stated to be to encourage full recognition of the fourth amendment by the authorities by "punishing" them when they violate its provisions. This formulation is somewhat misleading because it fails to include any reference to the one specific form which this "punishment" may take, *viz.*, refusal by the courts to allow the authorities to use in a criminal prosecution evidence which they would not have obtained if the violation had not taken place. In other words, the sanction is limited to preventing the authorities from "profiting" by their official misconduct. It does not extend so far as to allow an otherwise guilty defendant to go free *merely* because he has been the victim of an unlawful search or seizure.
* * *

This is the factor that permits the government to remove the taint from otherwise poisoned fruit by establishing that the unlawful act from which it resulted was not a *sine qua non* of its discovery.

Ensuring that the government does not profit from the initial illegality can be accomplished by holding the

government to a strict standard of proof in inevitable discovery cases (see pages 15-16 & note 8, *supra*). If the government is able to show that the evidence *would* inevitably have been discovered, the nature of the initial illegality becomes analytically irrelevant.

b. In any event, we doubt the validity of the premise that the inevitable discovery doctrine significantly threatens the deterrent function of the exclusionary rule by removing a significant disincentive to official illegality. Any extra amount of deterrence that might be obtained from requiring good faith as an element of the inevitable discovery doctrine is simply too speculative to outweigh the societal costs of suppressing evidence that would have been obtained in any event. It seems quite improbable that a police officer would engage in conduct he knew to be illegal in the hope that the government could later prove that it would have found the same evidence through lawful means. This case serves to demonstrate the point—as previously described (see pages 17-18, *supra*), the State had to put on extensive evidence about the nature of the on-going search for the body and convince the courts that that search would have been successful. It will almost always be easier to prove that the evidence was obtained lawfully than to prove hypothetical inevitable discovery, and any sensible police officer is likely to understand that fact. The Eighth Circuit made the same point in its subsequent decision adopting the inevitable discovery doctrine (*United States v. Apker*, 705 F.2d at 307):

[T]he deterrent effect of the exclusionary rule would remain because at the time police engage in an illegal search they would not know whether or not a later, legal discovery was inevitable. For instance, a police officer would not feel free to conduct a warrantless search while his partner is seeking a warrant. The officer would not know whether the warrant would be issued and what the scope of the search allowed by the warrant would be.

At the point at which an officer must decide what action to take, therefore, the possibility that the evidence he seeks would be discovered absent any illegality seems far too speculative to encourage unlawful "shortcuts." Cf. *United States v. Ceccolini*, 435 U.S. at 283 (Burger, C.J., concurring) ("the concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct").

To be sure, a law enforcement officer at the point of his misconduct may occasionally be able to anticipate that evidence obtained thereby will be admissible at trial under the inevitable discovery doctrine. But the more confident he is in that assessment, the less motivated he will be to seek the evidence by illegal means. Moreover, the state supreme court and the court of appeals, in imposing a good faith requirement, overlooked the existence of alternatives to the exclusionary rule that might deter law enforcement officers from taking improper advantage of the doctrine by bad faith constitutional violations. For example, intentional violation of an individual's constitutional rights may subject a federal agent to a civil action for damages. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). In addition, such misconduct will ordinarily be punishable by departmental disciplinary measures and resort to disciplinary procedures is more likely when the illegality was not even needed to secure the evidence. These deterrents significantly reduce the danger that the inevitable discovery doctrine might encourage police misconduct, for it would be foolish for a police officer to risk civil liability or disciplinary measures when he knows that he does not have to do so in order for the government to obtain the evidence he seeks.

c. In support of a good faith requirement, respondent relies on this Court's decisions in *Brown v. Illinois*, *supra*, and *Dunaway v. New York*, *supra*. In *Brown* and *Dunaway*, the issue was whether the giving of *Miranda* warnings following an illegal arrest sufficiently attenu-

ated the taint of the arrest to permit the admission of the defendant's subsequent confession. In rejecting a rule that *Miranda* warnings, by themselves, always purge the taint of an illegal arrest, the Court in *Brown* expressed the well-justified concern that, under such a rule, "[a]rrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings"; consequently, "[a]ny incentive to avoid Fourth Amendment violations would be eviscerated * * *" (422 U.S. at 602; footnote omitted). Eschewing the proposed automatic attenuation rule, the Court held that in determining whether a confession is sufficiently attenuated from an unlawful arrest, a court must consider several additional factors: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, * * * and, particularly, the purpose and flagrancy of the official misconduct * * *" (*id.* at 603-604; footnotes omitted). In *Dunaway*, the Court reaffirmed this multi-faceted inquiry (442 U.S. at 218). Respondent argues (Br. in Opp. 12) that "flagrancy is simply the opposite side of the coin of good faith" and that there is "no less reason to consider good faith under [the inevitable discovery] exception than under the 'attenuation' doctrine."

We disagree. There are significant distinctions between *Brown*-type attenuation cases and inevitable discovery cases that make it appropriate that they be treated differently. In *Brown*, the police probably would not have obtained the confession but for the illegal arrest. When the official misconduct is a direct and "but for" cause of a confession, the government may fairly be required to show that it has acted in good faith and has not merely manipulated events to avoid the consequences of its own intentional misconduct.

By contrast, the discovery of the evidence in the inevitable discovery context is never a "but for" conse-

quence of the police illegality; the whole point of the exception is that the evidence would have been discovered even if the illegality had not occurred. Furthermore, the applicability of the inevitable discovery doctrine in a particular case generally turns on circumstances outside the control of the offending officer; he cannot dissipate the taint by the "simple expedient" of performing some routine act such as the giving of *Miranda* warnings. As we have shown, the offending officer, at the point of his misconduct, will rarely be in a position to calculate whether the evidence he seeks would be discovered anyway; and even when he is in such a position, such knowledge would likely deter him from acting unlawfully, since there would be little point in his risking civil liability or disciplinary measures to obtain evidence that would in any event be discovered. Accordingly, the inevitable discovery doctrine poses nothing like the threat to effective deterrence that might flow from a rule enabling police officers to dissipate the taint of an illegal arrest merely by giving *Miranda* warnings.

d. Assuming *arguendo* that some incremental deterrence would be obtained by making good faith a necessary component of the inevitable discovery doctrine, nevertheless the maximization of deterrence has never been this Court's sole touchstone in deciding whether to apply the exclusionary rule to a particular class of cases. To the contrary, in recognition of the costs imposed by the exclusionary rule on the truthfinding process, the Court has restricted application of the rule "to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Moreover, the Court has recognized that in many circumstances "strict adherence" to the exclusionary rule "imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes." *Brown v. Illinois*, 422 U.S. at 609 (Powell, J., concurring). Thus, for example, the Court has refused to extend the benefit of the rule to persons other than those

whose own constitutional rights have been violated—even though such application might significantly increase the rule's deterrent impact—in recognition of the fact that the benefits of doing so would be outweighed by the “further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.” *Alderman v. United States*, 394 U.S. 165, 174-175 (1969). And “[e]ven in situations where the exclusionary rule is plainly applicable, [the Court has] declined to adopt a ‘per se or “but for” rule’ that would make inadmissible any evidence * * * which somehow came to light through a chain of causation that began with an illegal arrest.” *United States v. Ceccolini*, 435 U.S. at 276, citing *Brown v. Illinois*, 422 U.S. at 603.

In our submission, the costs of the exclusionary rule are simply too great to pay where the government would have discovered the challenged evidence regardless of the police misconduct. In the ordinary situation, the deterrent purpose of the exclusionary rule is presumably achieved by suppressing the evidence obtained as a result of the police illegality, since it is by the use of such evidence that the government would profit by its misconduct. But in the inevitable discovery context, the only benefit the government might derive from its illegality is a possible savings of time and perhaps resources, since the evidence eventually would be discovered in any event. In these circumstances, suppression is a disproportionate remedy. The Eighth Circuit itself has recognized this point, stating that probative evidence should not be excluded merely because police misconduct “affected the timing of the discovery of the evidence.” *United States v. Apker*, 705 F.2d at 307. Thus, as one commentator has observed, the inevitable discovery doctrine “serves well the *raison d’être* of the exclusionary rule by denying to the government the use of evidence ‘come at by the exploitation of * * * illegality’ and at the same time minimizes the opportunity for the defendant to receive an undeserved and socially undesirable bonanza.” Maguire, 55 J. Crim. L., Criminology & Police Sci. at 317.

e. Assuming arguendo that good faith is a necessary component of the inevitable discovery doctrine, we submit that the inquiry should focus on the objective reasonableness of the officer's conduct rather than the officer's subjective intent. See *Harlow v. Fitzgerald*, No. 80-945 (June 24, 1982) (holding that the good-faith defense in civil damages actions for alleged constitutional torts should have only an objective component); *People v. Adams*, 53 N.Y.2d 1, 9-10, 422 N.E.2d 537, 541 (1981) (adopting a good-faith exception to the exclusionary rule and stating that the test should be strictly objective). But see *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981) (adopting a good-faith exception entailing both an objective and a subjective component).

In *Harlow*, the Court rejected a subjective test in large part to protect public officials and the operations of government from the costs and disruptions of trials devoted to probing the mental processes of decisionmakers. See slip op. 15-17. While those concerns may not be as clearly applicable in the present context, equally significant considerations call for the same result. It will rarely be useful, though it will almost always be quite time-consuming, to probe the mental processes of police officers. Indeed, the court of appeals itself pointed out, perhaps unwittingly, one of the principal reasons for rejecting a subjective test. In holding that the record in this case failed to support Detective Leaming's subjective good faith, the court observed that "[w]e do not even have a self-serving statement from Leaming himself that he was unaware of any constitutional violation" (Pet. App. A13). It hardly seems sensible for courts to establish a test in which the self-serving statements of police officers may become decisive evidence.¹¹

¹¹ As an aside, it would appear that the reason Detective Leaming did not testify at the state court suppression hearing was because that hearing focused exclusively on the facts relating to the inevitability of the discovery. As to those facts, the key witness was the officer in charge of the search for the body, rather than

Under an objective standard for evaluating bad faith, therefore, unwieldy and awkward inquiries into the subjective intent of arresting or searching officers would be avoided. Instead, the inquiry would involve only an objective assessment of the officer's conduct in light of the factual circumstances of the case and the extent to which the governing legal principles have been predictably articulated. Furthermore, it seems unlikely that there will be many occasions on which a reasonable officer should not have known that his action was improper, but the particular officer did entertain such a belief; the inclusion of a subjective component will therefore rarely alter the result but would instead merely produce burdensome and largely unproductive litigation. See *Harlow*, slip op. at 18.

Contrary to the finding of the court of appeals here, there is no basis for concluding that Detective Leaming knew or should have known that his conduct was unconstitutional. The evidence showed that before the commencement of the trip to Des Moines, respondent was repeatedly advised of his rights by two attorneys, two sets of police officers, and a judge. *Brewer v. Williams*, 430 U.S. at 390-391; *id.* at 431 (White, J., dissenting). Once the trip began, it was respondent, not the officers, who started the conversation and opened up the subject of the criminal investigation (*id.* at 440 (Blackmun, J., dissenting); *Williams v. Brewer*, 509 F.2d 227, 235 (8th Cir. 1974) (Webster, J., dissenting)). During the course of the conversation, Detective Leaming made the so-called Christian burial speech, prefacing it by saying that this was something he wanted respondent to "think about" (430 U.S. at 392). When, following the speech, respondent asked Detective Leaming why he thought their route to Des Moines would be taking them past the body, Detective Leaming answered the question and then stated:

Detective Leaming. At the hearing on the habeas corpus petition in federal district court, there was likewise no need for Detective Leaming to testify because the state supreme court had by that time held that good faith was an objective matter, to be assessed against the then-prevailing state of the law, rather than what was in Detective Leaming's mind during the car ride.

"I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." *Id.* at 393. Some considerable time thereafter, without any prompting on the part of any state official, respondent said that he would direct the officers to the body. *Ibid.*; *id.* at 433 (White, J., dissenting). Indeed, at no point during the trip, so far as any court has found, did the officers ask respondent any questions at all.

In holding by a five to four majority that Detective Leaming's conduct deprived respondent of his Sixth Amendment right to counsel, the court relied on *Massiah v. United States*, 377 U.S. 201 (1964). In that case, Massiah retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail and without his knowledge, a federal agent secured a confederate's consent to install a radio transmitter in the latter's car. The agent was thereby able to hear several incriminating statements elicited from Massiah by the confederate as the two men conversed in the car, and the statements were subsequently admitted at trial. This Court reversed Massiah's conviction on the ground that the statements had been deliberately elicited from him in the absence of his attorney, in violation of his right to counsel. *Id.* at 206.

Here, Detective Leaming could not reasonably have been expected to know that his conduct violated *Massiah*. First, unlike Massiah, respondent had been warned expressly that his statements could be used against him. Second, respondent knew that his statements were being noted by police officers, whereas in *Massiah* the Court emphasized that "'Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.'" 377 U.S. at 206, quoting *United States v. Massiah*, 307 F.2d 62, 72-73 (2d Cir. 1962) (Hays, J., dissenting). Finally, Detective Leaming here asked respondent no questions but simply made a statement accompanied by a request that respondent make no response—indeed, insisting that there be no further discussion of the matter. And Detec-

tive Leaming did not even make the statement until respondent himself had broached the subject of the investigation.

It is difficult to see how Detective Leaming can fairly be held to knowledge that his conduct violated *Massiah* when four members of this Court, in vigorous dissents, reached just the opposite conclusion. For example, Justice Blackmun, in a dissenting opinion in which Justices White and Rehnquist joined, stated (430 U.S. at 439-440; emphasis added) :

I am not persuaded that Leaming's observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams. Contrary to this Court's statement, * * * the Iowa Supreme Court appears to me to have thought and held otherwise, *State v. Williams*, 182 N.W.2d 396, 403-405 (1970), and I agree. * * * Without further reviewing the circumstances of the trip, I would say it is *clear* there was no interrogation.

And Chief Justice Burger, also writing in dissent, stated (430 U.S. at 426 n.8) :

[T]here was no interrogation of Williams in the sense that term was used in *Massiah*, *Escobedo v. Illinois*, 378 U.S. 478 (1964), or *Miranda*. That the detective's statement appealed to Williams' conscience is not a sufficient reason to equate it to a police station grilling.

See also *id.* at 434, 436-437 n.6 (White, J., dissenting).¹²

¹² It is of course possible that *Brewer v. Williams* could have been decided as a *Miranda* case rather than a *Massiah* case. See Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 28 (1978). But even then, it would be difficult to imagine how Detective Leaming was to have known that there was any constitutional transgression in his Christian burial speech when, at the time he made it, this Court had not yet decided *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (holding that "interrogation" for *Miranda* purposes is not limited

It is of course true that Detective Leaming was "hoping to find out where that little girl was" (430 U.S. at 399). But that objective does not equate with an intention to violate either the Fifth or Sixth Amendment, particularly in view of the fact that the victim had been missing for only two days and the police could not be certain she was dead. And in any event, there is an important difference between an intent to elicit information—an activity central to good police work—and an intent to elicit information with knowledge that to do so would violate the suspect's constitutional rights. The fact that Detective Leaming entertained a subjective desire to obtain information from respondent says nothing about whether he intended to try to do so by unconstitutional means or should have known that his conduct was unconstitutional. As the state supreme court concluded (Pet. App. A45), he cannot reasonably be held to such knowledge.¹³

to direct questioning but also encompasses words or actions on the part of the police that they "should know are reasonably likely to elicit an incriminating response from the suspect").

¹³ Even under the subjective bad faith test employed by the court of appeals, it would seem that Detective Leaming's desire to locate the body should be irrelevant. A policeman's desire to obtain evidence, which is, after all, his job, cannot support a finding of subjective bad faith. Instead, the relevant inquiry, even under a subjective test, would be whether Detective Leaming believed he was acting illegally in his quest for evidence.

In this regard, the evidence strongly suggests, contrary to the court of appeals' conclusion, that Detective Leaming's motives were beyond reproach. For one thing, he essentially volunteered to tell the Christian burial speech at the first suppression hearing (see *Kamisar*, 66 Geo. L.J. at 223 & n.65). This is not the action of an officer who believed he had committed some illegality. See also *Kamisar*, 67 Geo. L.J. at 1 (Leaming did not know what "psychological coercion" was until he looked up the words in the dictionary after being accused of using it). And, as previously noted (see pages 6-7 note 3, *supra*), the record does not support the premise, so heavily relied upon by the court of appeals, that Detective Leaming broke any promises to respondent's counsel.

Finally, although we did not participate in the lower court proceedings, it appears that the State correctly argues that the issue

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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of subjective bad faith was never litigated. Under these circumstances, fairness requires that the State be permitted the opportunity to offer proof on that issue, if indeed it has any relevance to this case. As already explained (see pages 26-27 note 11, *supra*), Detective Leaming's failure to testify at the second suppression hearing is fully understandable in light of the procedural posture of the case, and thus the State cannot be deemed to have waived its right to introduce his testimony.